



**Ng'ethe & 2 others v Nyandarua Progressive Agencies Company Limited & 5 others
(Environment & Land Case 38 of 2022) [2023] KEELC 16692 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 38 OF 2022**

**FM NJOROGE, J
MARCH 30, 2023**

BETWEEN

**LAWRENCE MUNGAI NG'ETHE 1ST PLAINTIFF
DOUGLAS MACHARIA KAMAU 2ND PLAINTIFF
JOHN MUTHUI MAINA 3RD PLAINTIFF**

AND

**NYANDARUA PROGRESSIVE AGENCIES COMPANY LIMITED 1ST
DEFENDANT
ELIUD SAMUEL WAWERU 2ND DEFENDANT
PETER KINYANJUI NGUGI 3RD DEFENDANT
JESSE KAMERIA NGWIRI 4TH DEFENDANT
JOSEPHAT MUREITHI MURITHI 5TH DEFENDANT
PETER WANJOHI KARANIA 6TH DEFENDANT**

RULING

1. This ruling is in respect of the defendants' preliminary objection dated 25/01/2023 which is on the following ground:
 - a. That the claim against the defendants is time barred and offends the mandatory provisions of sections 4(1) and 7 of the [Limitation of Actions Act](#).
2. The preliminary objection was canvassed by way of written submissions. The plaintiffs filed their written submissions dated 31/12/2023 on 03/02/2023 while the defendants filed their submissions 07/02/2023 on 08/02/2023.



3. The defendants in their submissions submitted on the following issues:
 - a. Whether the defendants have satisfied the grounds for raising a preliminary objection;
 - b. Whether the claim against the defendants is time barred.
4. On the first issue, the defendants relied on the cases of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, *Hassan Ali Jobo & another v Suleiman Said Shabbal & 3 Others* [2014] eKLR, *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* [2015] eKLR and submitted that the suit had been filed out of time and it therefore offended the provisions of sections 4(1) and 7 of the *Limitation of Actions Act*. The defendants further submitted that the claim brought by the plaintiffs' dates back to the year 2004 when they bought the land from the defendants and it is therefore time barred.
5. On the second issue, the defendants reiterated that the plaintiffs claim to have acquired the suit property from the 1st defendant in the year 2004 and in accordance to section 7 of the *Limitation of Actions Act*, they could only have sued for title to the suit land on or before the year 2016. They relied on the cases of *Edward Moonge Lengusuranga v James Lanaiyara & Another* [2019] eKLR, *Hannah Wanjiru Mburu v Simon Nyutu Mararo & 3 Others* [2021] eKLR among other cases and submitted that the plaintiffs are guilty of laches and as such not entitled to any equitable remedy.
6. The plaintiffs in their submissions submitted on whether the preliminary objection is meritorious. They relied on the cases of *Japhes Arisa Makori (Chairman suing on behalf of Ndonyo Grazing Ground Community Based Organization) & another v County Government of Kisii & Another* [2020] eKLR, *Oraro v Mbaja* [2005] 1KLR 141 and submitted that the defendants have hinged their preliminary objection on sections 4(1) and 7 of the *Limitation of Actions Act* which is a pure point of law but it is blurred with factual details liable to be contested and proved through the process of evidence especially as to when the cause of action arose. The plaintiffs further submitted that the pleadings do not expressly indicate when the course of action arose which issue can only be determined at trial by way of viva voce evidence. The plaintiffs also submitted that they are alleging fraud in their plaint and the question of when they discovered fraud or concealment of the right of action against the defendants is a matter to be ascertained at the trial. They further submitted that section 7 of the *Limitation of Actions Act* is not applicable in the present application as section 26(a) of the *Limitation of Actions Act* provides for the extension of the limitation period. They concluded their submissions by seeking that the defendants' preliminary objection be dismissed.

Analysis and Determination

7. After considering the preliminary objection and the submissions, the only issue that arises for determination is whether the plaintiff's case is time barred and offends the mandatory provisions of sections 4(1) and 7 of the *Limitation of Actions Act*.
8. The definition of a preliminary objection was set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. (1969) EA 696 where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Per Law, JA.:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of



the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Per Newbold, P.:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

9. The Court of Appeal in the case of *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also stated as follows:

“A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. The defendants allege that their preliminary objection raises a pure point of law. The plaintiffs on the other hand admit that the preliminary objection raises a pure point of law but it is blurred with factual details which are liable to be contested. It is this court’s view that the defendants’ preliminary objection is on a point of law and touches on the jurisdiction of this court to entertain the suit.

11. Section 4 (1) of the *Limitation of Actions Act* provides as follows:

- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this *Act* or by any other written law.

12. Section 7 of the *Limitation of Actions Act* provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

13. Section 26 of the *Limitation of Actions Act* also provides that the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or when with reasonable diligence fraud could have been discovered. The court in the case of *Nyakundi Okerio & another v Elijah Sokobe Obot & 2 others* [2021] eKLR stated as follows:

“19. Before determining whether this suit is statute barred by dint of section 4 of the *Limitation of Actions Act* and whether the plaintiff can seek refuge in section 26



of the same Act, it will be important to first and foremost to establish the main cause of action in the suit. In the case of Edward Moonge Lenguuranga v James Lanaiyara & another (2019) eKLR, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. The court defined a cause of action to be the legal theory upon which a Plaintiff brings a suit. That being the case, it is important to look at the averments and the prayers contained in the plaint to determine the cause of action raised by the Plaintiff.”

14. In the amended plaint dated 24/11/2022, the plaintiffs allege that that they are the owners of plot numbers 1425 and 355 which they took possession of in the year 2004. They aver that that the defendants begun to interfere with their occupation without any color of right and have allocated the said properties to third parties who have begun to threaten them with illegal trespass and eviction. The plaintiffs have set out particulars of fraud against the defendants and the interested party before setting out their claim against them. It is my view that it is not clear from the pleadings as to when the cause of action arose.
15. The Court in the case of Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi [2019] eKLR held that the defence of limitation of time was a matter of determination at the trial and not be summarily dealt with as a preliminary objection and cited with approval the cases of Oruta & Another v Nyamato [1998] KLR 590 and Divecon Ltd v Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997 and stated as follows:

“The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of Oruta & Another v Nyamato [1998] KLR 590, where the court held that limitation of action:-

“... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”

14. See also the case of Divecon Ltd v Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (ibid) that:

“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act...”

16. It is my view therefore that the issue of whether the suit is time barred under the Limitation of Actions Act can only be determined at the hearing upon each party adducing evidence. Consequently, the defendants’ preliminary objection lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

